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US BANK NATIONAL ASS'N ND; US BANK NATIONAL ASS'N; FIRSTPLUS HOME LOAN TRUST 1996-2; FIRSTPLUS HOME LOAN OWNER TRUSTS 1996-3, 1996-4, 1997-1, 1997-2, 1997-3, 1997-4, 1998-1, 1998-2, 1998-3, 1998-4, AND 1998-5; WILMINGTON TRUST CO.; GOLETA NATIONAL BANK; RESIDENTIAL FUNDING CO., LLC; SOVEREIGN BANK; HSBC FINANCIAL CORP., F/K/A HOUSEHOLD FINANCIAL CORP.,

Petitioners,

v.

DEANTHONY THOMAS, SUSAN JELINKE-THOMAS, STEVEN M. RICH,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF *AMICI CURIAE* AMERICAN BANKERS ASSOCIATION, THE CLEARING HOUSE ASSOCIATION L.L.C., CONSUMER BANKERS ASSOCIATION, THE FINANCIAL SERVICES ROUNDTABLE AND MISSOURI BANKERS ASSOCIATION IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

This brief is submitted by *Amici Curiae* American Bankers Association, The Clearing House Association L.L.C., Consumer Bankers Association, The Financial Services Roundtable and Missouri Bankers Association ("*Amici*") in support of Petitioners US Bank National Ass'n ND; US Bank National Ass'n; FirstPlus Home Loan Trust 1996-2; FirstPlus Home Loan Owner Trusts 1996-3, 1996-4, 1997-1, 1997-2, 1997-3, 1997-4, 1998-1, 1998-2, 1998-3, 1998-4, and 1998-5; Wilmington Trust Co.; Goleta National Bank; Residential Funding Co., LLC; Sovereign Bank; and HSBC Financial Corp., f/k/a Household Financial Corp. Petitioners and Respondents have consented to the filing of this brief by letters accompanying this brief.[1]

STATEMENT OF INTEREST OF *AMICI CURIAE*

The American Bankers Association ("ABA") is the principal national trade association of the financial services industry in the United States. Its members, located in each of the fifty states and the District of Columbia, include financial institutions of all sizes and types, both federally and state chartered. ABA member banks hold the majority of the domestic assets of the banking industry in the United States.

The Clearing House Association L.L.C. ("The Clearing House") is an association of leading commercial banks that, through an affiliate provides

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[1] Pursuant to Supreme Court Rule 37.6, *Amici* state that this brief was prepared in its entirety by *Amici* and their counsel. No monetary contribution toward the preparation or submission of this brief was made by any person other than *Amici*, their members or their counsel.

payment, clearing and settlement services to its member banks and other financial institutions.[2] The Clearing House often appears as *amicus curiae* in cases that present issues of importance to the banking industry.

The Consumer Bankers Association ("CBA") is the only national financial trade group focused exclusively on retail banking and personal financial services—banking services geared toward consumers and small businesses. As the recognized voice on retail banking issues, CBA provides leadership, education, research, and federal representation on retail banking issues. CBA members include most of the nation's largest bank holding companies as well as regional and super-community banks that collectively hold two-thirds of the industry's total assets.

The Financial Services Roundtable represents 100 of the largest integrated financial services companies providing banking, insurance and investment products and services to the American consumer. Member companies participate through the Chief Executive Officer and other senior executives nominated by the CEO. Roundtable member companies provide fuel for America's economic engine, accounting directly for $74.7 trillion in managed assets, $1.1 trillion in revenue and 2.3 million jobs.

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[2] The members of The Clearing House are Bank of America, N.A., The Bank of New York Mellon, Capital One, N.A., Citibank, N.A., Deutsche Bank Trust Company Americas, HSBC Bank USA, N.A., JPMorgan Chase Bank, N.A., The Royal Bank of Scotland, N.V., UBS AG, U.S. Bank N.A. and Wells Fargo Bank, N.A.

The Missouri Bankers Association ("MBA") is the principal advocate for the banking industry and is dedicated to providing products and services that bring benefits to its members. Founded in 1891, the MBA's membership includes commercial banks and savings and loan associations representing over 1,800 banking locations and over 30,000 bank employees in the state of Missouri.

The underlying dispute in this case involves loans acquired by Petitioners sometime after their origination by FirstPlus Bank, a state bank whose deposits were insured by the Federal Deposit Insurance Corporation (the "FDIC"). Petitioners and *Amici* are asking this Court to review (and ultimately reverse) an erroneous decision that contradicts Congress' express intent. If allowed to stand, the decision would restrict the ability of state banks to remove litigation to a federal forum and severely disadvantage state banks when they make interstate consumer loans, including credit card, private student, home equity and automobile loans.

Congress enacted Section 27 of the Federal Deposit Insurance Act, 12 U.S.C. § 1831d ("Section 27"), with the explicit purpose to "prevent discrimination against State-chartered insured depository institutions . . . with respect to interest rates." In recognition of Congress' expressed intent and its use of virtually identical language in Section 27, which applies to state banks, and 12 U.S.C. §§ 85-86 ("Sections 85-86"), applicable to national banks, federal courts and the FDIC have, from the time of Section 27's enactment in 1980 through the present, uniformly treated state banks and national banks the same with regard to the interest they may charge. *See, e.g., Greenwood Trust Co. v. Commonwealth of Massachusetts*, 971

F.2d 818 (1st Cir. 1992), *cert. denied*, 506 U.S. 1052 (1993); *Discover Bank v. Vaden*, 489 F.3d 594, 605 n.14 (4th Cir. 2007), *rev'd on other grounds*, 129 S. Ct. 1262 (2009); *General Counsel's Opinion No. 10: Interest Charges Under Section 27 of the Federal Deposit Insurance Act*, 63 Fed. Reg. 19,258 (Apr. 17, 1998) ("General Counsel Op. No. 10").

The Eighth Circuit has now departed from the consistent pre-existing understanding of Section 27 in holding that Section 27, unlike Sections 85-86, does not completely preempt state-law usury claims. If allowed to stand, its decision would deprive state banks (and companies acquiring loans from state banks) of access to the federal courts when the interest charged on their loans is challenged, even though a national bank lender would have federal question jurisdiction for the very same claim.

Further, the decision does not "merely" deprive state banks of the benefit of *complete* preemption and hence a federal forum under Section 27. In direct conflict with General Counsel Op. No. 10 and this Court's decision in *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735 (1996), the logic of the Eighth Circuit decision would narrow the scope of *ordinary* preemption provided by Section 27(a) to periodic rates of interest. The decision would thereby exclude from Section 27(a)'s protection a host of other charges constituting "interest" under Section 85 and its implementing regulation, 12 C.F.R. § 7.4001(a), as well as General Counsel Op. No. 10. This would impair the functioning of state banks, reduce the availability of consumer credit and put state banks at a competitive disadvantage to their federal counterparts. Accordingly, *Amici* respectfully urge this Court to grant Petitioners' petition for a writ of certiorari.

ARGUMENT

I. THE EIGHTH CIRCUIT'S OPINION SHOULD BE REVERSED.

There is no dispute that, if a national bank had made the loans at issue in the underlying dispute, Respondents' claims would be completely preempted under Sections 85-86 and would thus arise under federal law. However, because the loans in question were made by a state bank and hence were governed by Section 27 rather than its functional twin, Sections 85-86, the Eighth Circuit held that the claims were not completely preempted and, thus, did not provide a basis for federal-question jurisdiction. This result is at odds with the clear intention of Congress, as manifested in the express language of Section 27(a), longstanding regulatory guidance on the issue and the decisions of other courts of appeal. The decision is also contrary to this Court's ruling in *Smiley*, which the Eighth Circuit ignored entirely.

As Petitioners have cogently observed, the Eighth Circuit fundamentally erred in its interpretation of Section 27. The court dismissed without serious analysis both language in Section 27(a) and judicial and administrative authority requiring a contrary holding. At the same time, it misconstrued the language in Section 27 that formed the basis for its decision.

A. The Opinion Below Ignored The Anti-Discrimination Clause Of Section 27(a).

The very first clause of Section 27(a) explains that it is enacted "[i]n order to prevent discrimination against state-chartered insured depository institutions . . . with respect to interest rates." The Eighth

Circuit, however, never analyzed the consequence of this passage.

As noted above, it is undisputed that Sections 85-86 completely preempt state-law usury claims against national banks. If Section 27 does not completely preempt the same claims against state banks, manifestly Section 27 has failed in its announced purpose to "prevent discrimination against State-chartered insured depository institutions . . . with respect to interest rates."

Further, as noted below, the logic of the Eighth Circuit decision below is not limited to complete preemption but could be applied in an ordinary preemption context. The inequality of result between state banks and national banks is even more harmful as to ordinary preemption than it is with regard to complete preemption.

The decision below is wrong, if for no other reason than its discriminatory impact on state banks with respect to the interest they may charge on their loans.

B. The Opinion Below Gave Insufficient Weight To The Virtually Identical Substantive Language In Section 27(a) And In Section 85.

Section 27(a) provides in pertinent part as follows:

> [A] State *bank . . . may . . .* take, receive, reserve, and *charge on any loan . . . interest at* a rate of not more than 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal Reserve bank in the Federal Reserve district where such State bank . . . is located or at *the rate allowed by the laws of the*

> *State, territory, or district where the bank is located*, whichever may be greater. . . . [Emphasis added.]

Section 85 provides in virtually identical terms as follows:

> [A national banking] *association may* take, receive, reserve, and *charge on any loan . . . interest at the rate allowed by the laws of the State, Territory, or District where the bank is located*, or at a rate of 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal reserve bank in the Federal reserve district where the bank is located, whichever may be the greater . . . . [Emphasis added.]

The Eighth Circuit acknowledged, as it must, that "other federal courts have interpreted the language in [Section 27(a)] differently" than the Eighth Circuit. App. at 11a (citing *Vaden*, 489 F.3d at 605 n.14). In fact, not just the Fourth Circuit in *Vaden* but rather *every* federal court of appeals that has considered the issue, including the First, Third and Fifth Circuits, as well, disagrees with the approach taken by the Eighth Circuit below. *See, e.g.*, *Greenwood Trust*, 971 F.2d at 827 (state-chartered banks lending under Section 27(a) have the same rights as national banks lending under Section 85); *In re Community Bank of Northern Virginia*, 418 F.3d 277, 295 (3d Cir. 2005) (same); *Gavey Properties/762 v. First Fin. Sav. & Loan Ass'n*, 845 F.2d 519 (5th Cir. 1988) (same for savings associations).[3] These courts have empha-

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[3] Section 521 of the Depository Institutions Deregulation and Monetary Control Act of 1980 ("DIDA"), Pub. L. No. 96-221, 94 Stat. 132, adopted Section 27, applicable to state banks. Section

sized the similarity in language between Section 27(a) and Section 85, and have drawn the obvious conclusion that this parallel language is meant to be interpreted in *pari materia*.

While the Eighth Circuit at least acknowledged the existence of contrary judicial authority, it ignored FDIC guidance on the issue. The FDIC, like the courts that reached rulings inconsistent with the decision below, recognizes that Section 27 is to be interpreted in *pari materia* with Sections 85-86. General Counsel Op. No. 10 ("Section 27 was intended to give state-chartered banks the benefit of section 85 and purposefully engrafted, at several points, language from the NBA. . . . The FDIC's practice also has been to construe the two provisions similarly.") (citing *Greenwood Trust*, 971 F.2d at 826). State banks throughout the country have relied upon this administrative interpretation since its adoption.

C. The Eighth Circuit's Decision Accords Undue Importance To A Portion Of Section 27(a) That Is Immaterial To The Court's Analysis.

The entire basis for the court's decision to treat Section 27 differently from Sections 85-86 is a single clause in Section 27(a), which provides that Section 27(a) applies if "the applicable rate [of interest] prescribed in this subsection exceeds the rate such State bank . . . would be permitted to charge in the absence of this subsection." As a threshold matter,

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522 of DIDA, using virtually identical language, governs interest charges by savings associations. Section 522 was originally codified at 12 U.S.C. § 1730g and was subsequently reenacted and recodified as Section 4(g) ("Section 4(g)") of the Home Owners' Loan Act ("HOLA"), 12 U.S.C. § 1463(g).

the clause in question "merely recognizes that if the DIDA rate is no higher than what state law authorizes, the protection the statute grants is unnecessary, as the bank can simply charge the state rates," Pet. Br. at 19-20 (citing *Gavey Props.*, 845 F.2d at 522).[4]

Moreover, the court simply *assumed*, without any analysis whatsoever, that the interest rate referenced therein was limited to the periodic rate of interest authorized on the loan. App. 10a-11a. The court ignored *Smiley* and thereby failed to consider the import of this Court's holding that the term "interest" includes a full spectrum of "interest" charges and not just the periodic rate of interest.[5]

In *Smiley*, this Court deferred to an OCC regulation defining "interest" to encompass not just interest charged at a periodic rate over time but rather "any payment compensating a creditor or prospective creditor for an extension of credit, making available of a line of credit, or any default or breach by a borrower of a condition upon which credit was

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[4] As Petitioners have observed, Pet. Br. at 20, *Gavey* was decided under the original version of Section 522, 12 U.S.C. § 1730g, which contained the same language as Section 27. As Petitioners have further observed, *id.* at 21, Section 522 was recodified as Section 4(g) without the clause in question. The legislative history of Section 4(g) confirms that the recodification was meant to *preserve*, not modify, the pre-existing preemption of state usury laws.

[5] The Eighth Circuit also disregarded *its* own prior opinion in *Phipps v. Federal Deposit Ins. Corp.*, 417 F.3d 1006 (8th Cir. 2005), which followed *Smiley* on this very point. *Phipps*, 417 F.3d at 1011-1012 ("The Supreme Court has held various fees . . . are not excluded from the NBA's definition of interest simply because the fees do not vary depending on the amount owed or the length of the delay.").

extended," including a specific laundry list of charges. *Id.* at 740-745 (citing 12 C.F.R. § 7.4001(a)).

As noted above, the FDIC has been clear that its definition of "interest" under Section 27(a) is identical to the OCC's definition of interest under Section 85. *See* General Counsel Op. No. 10, concluding that "it is the Legal Division's opinion that the term "interest", for purposes of section 27, includes those charges that a national bank is authorized to charge under section 85 of the NBA. *See* 12 CFR 7.4001(a) (1997)." *See also* 12 C.F.R. § 560.110(a) (same definition for savings associations lending under Section 4(g)).

Here, the origination fees attacked by Respondents are "interest" charges under Section 85 and Section 27(a). Since the charges for "interest" in the form of origination fees permitted by Section 27(a) and the California rates assimilated into Section 27(a) exceed the amounts permitted under Missouri law, the condition to application of Section 27 argued by Respondents has in fact been met. Accordingly, Respondents' claims are subject to Section 27 and are preempted.

II. THE EIGHTH CIRCUIT'S OPINION THREATENS SEVERE INJURY TO STATE BANKS, CONSUMERS AND THE ECONOMY.

At its most basic level, the decision below deprives Petitioners—as well as approximately 5,800 state banks throughout the country—of the federal forum that should be available to them when defending completely preempted claims. This loss of a federal forum seriously disadvantages state banks.

This is not "just" a complete preemption case, however. Indeed, its impact on ordinary preemption is an even larger issue for state banks. On this score, "notwithstanding any State constitution or statute which is . . . preempted for the purposes of [Section 27]," Section 27(a) empowers state banks—just as Section 85 authorizes national banks—to "charge on any loan . . . interest . . . at the rate allowed by the laws of the State . . . where the bank is located . . . ." 12 U.S.C. § 1831d(a). And this Court's unanimous decision in *Marquette National Bank of Minneapolis v. First of Omaha Service Corp.*, 439 U.S. 299 (1978), the seminal modern-day case under Section 85, holds that this interest authority may be "exported" from the bank's home state on loans made to borrowers in other states, without regard to borrower-state usury laws. *See also Smiley* ("interest" in the form of non-periodic credit card charges may be exported by national banks under Section 85).

The importance of Section 85, its DIDA progeny (Section 27 and Section 4(g)) and *Marquette* to the financial services industry and the public at large is hard to overstate. Since *Marquette* and the adoption of DIDA just two years later, these statutes served for years as the engine driving both the widespread availability of consumer credit and the economic strength of our consumer-based economy. *See* Baxter, W.F., *Section 85 of the National Bank Act and Consumer Welfare* (hereinafter, "Baxter"), 1995 UTAH L. REV. 1009, 1010 ("The Supreme Court's 1978 decision in [*Marquette*] undoubtedly played a major role in fostering the spectacular growth of the credit card industry. *Marquette* effectively freed the industry from overlapping state regulation of finance charges . . . ."); Todd J. Zywicki, *The Economics of Credit Cards*, 3 CHAP. L. REV. 79, 154 (2000)

(*Marquette* led to "the dramatic expansion in the benefits associated with credit cards, such as greater customer service, co-branding and affinity cards, and a myriad of other benefits.").

The federal preemption of state law provided by *Marquette* is necessary in order to permit federally insured institutions to safely and efficiently offer their loan products nationwide. As the OCC's Chief Counsel warned: "When national banks are unable to operate under uniform, consistent, and predictable standards, their business suffers, and their customers may face higher costs or more limited product offerings—or both—as a result." Testimony of Julie L. Williams, OCC Chief Counsel, Before the Subcommittee on Oversight and Investigations of the Senate Committee on Financial Services (Jan. 28, 2004). Of course, this concern applies equally to state banks.

While *Marquette* and *Smiley* arose in the context of credit card programs, the power to export "interest" from the bank's home state is not limited to credit cards. Indeed, this exportation authority is central to all manner of interstate loans, including credit card, private student, automobile, home equity and other consumer loans.

In most consumer lending, banks charge a mixture of periodic interest and other charges. For example, annual fees are an important source of revenue on credit cards. Private student loans frequently involve both periodic interest charges and origination fees. Home equity loans frequently involve origination fees, annual fees and/or other charges.

All of these fees are clearly "interest" under Section 85 and Section 27(a), as interpreted in 12 C.F.R. § 7.4001(a) and General Counsel Op. No. 10. Yet the

Eighth Circuit opinion treats them as non-"interest" charges outside the scope of Section 27 preemption. If the Eighth Circuit opinion remains intact, state banks would be limited to the exportation of periodic interest charges and/or the vagaries of conflict of laws analysis. Accordingly, they would have to increase those charges and/or reduce the amount of credit available to consumers.

Economic factors are already placing historic stress on credit availability. Indeed, Federal Reserve Board data show that outstanding consumer credit peaked in July 2008 and, with the exception of modest increases in January 2009 and 2010 (immediately after the Christmas holiday season), has consistently declined each month since then. Federal Reserve Board Statistical Release G.19, Consumer Credit (last update April 7, 2010), *available at* http://www.federalreserve.gov/releases/g19/hist/cc_hist_sa.html.

The Federal Reserve Board also reported that, for every calendar quarter from the fourth quarter of 2007 through the first quarter of 2010, the majority of loan officers (and in most quarters the substantial majority of loan officers) surveyed by the Board reported that their institutions were tightening credit standards for both credit card loans and other consumer loans. Senior Loan Officer Opinion Survey on Bank Lending Practices Chart Data, Figure 4 (last update Feb. 1, 2010), *available at* http://www.federalreserve.gov/boarddocs/SnLoanSurvey/201002/chartdata.htm.

The legal uncertainty created by the decision below would undoubtedly cause problems for state banks seeking to sell or securitize their loans. And problems with secondary markets for loans inevitably reduce

the ability of banks to lend.[6] A further reduction in credit availability at the present time would constitute a hardship not only for state banks but also for the consumers who rely upon loans from state banks.

As one analyst warned:

> [T]he greatest gains from federal preemption are likely to accrue to the least well-off consumers in society. Regulatory restrictions in credit markets hurt highest-risk borrowers the most. Based on a review of the empirical literature estimating the impact of restrictive interest rate ceilings before *Marquette*, one study concludes that "lower-income families and families headed by younger persons would seem to be among those most likely to be denied credit as a result of such [interest rate] ceilings." [footnote omitted]

Baxter, 1995 UTAH L. REV. at 1023

In sum, the Eighth Circuit went fundamentally off-course on an issue of major importance.

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[6] *See Interagency Statement on Sales of 100% Loan Participations* at p. 1 (Apr. 10, 1997), *available at* http://www.ots.treas.gov/_files/84056.pdf ("A loan participation is a sharing or selling of interests in a loan. Depository institutions use loan participations as an integral part of their lending operations. Participations may be sold to enhance an institution's liquidity, interest rate risk management, capital, and earnings; diversify its loan portfolio; and serve the credit needs of its borrowers."); *Interagency Guidance on Asset Securitization Activities*, *available at* http://www.fdic.gov/news/news/financial/1999/FIL99109.pdf ("For several years, large commercial banks have been using asset securitization as an alternative method of funding balance sheet assets, improving financial performance ratios and generating fee income. [T]he OCC continues to endorse the use of asset securitization as a tool to manage the bank's balance sheet and more efficiently meet customer needs . . . .").

CONCLUSION

For the reasons stated herein and in the Petition for Certiorari, this Court should grant the Petition.

Respectfully submitted,

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